EXHIBIT D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
Case No.: 1:19-cv-00768-BMC

LASHAWN SHARPE, individually and on behalf of all others similarly situated,

Plaintiff,

-against-

A & W CONCENTRATE COMPANY and KEURIG DR PEPPER INC.,

Defendants.

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Deposition of:

DAPHNA HAVKIN-FRENKEL, PH.D.

ORIGINAL

T R A N S C R I P T of the stenographic notes of the proceedings in the above-entitled matter, as taken by and before TRACY COOK, a Certified Court Reporter, License No. 30XI00223200; Registered Professional Reporter; and Notary Public of the State of New Jersey, held at the offices of HOAGLAND, LONGO, MORAN, DUNST & DOUKAS, LLP, 40 Paterson Street, New Brunswick New Jersey, on Friday, November 15, 2019, commencing at 12:50 p.m.

other plants, natural sources? That could be in root beer or cream soda, right?

A. That's correct. That's correct. But we can't tell the difference with all this equipment if it's coming from where it's coming from. We could only tell it's vanilla.

Q. So in all of the testing, is it possible to know whether the vanillin in the root beer is from a vanilla bean or some other natural source?

A. No. You can do it but it is very, very expensive and you need a whole lot to extract. If you give me the flavor, I send it to special lab. I can tell you but I don't have the flavor. I have the root beer.

Q. Okay. So to answer the question whether there is vanilla derived from a vanilla bean in A&W root beer and A&W cream soda, you would have to send it to a laboratory to conduct a very expensive and complicated test?

A. For the vanilla, yes.

Q. For the vanilla as opposed to?

A. Yeah. It is possible.

Q. And that wasn't done here, was it?

A. No.

Q. So it's impossible to say based on the tests that were done either by Dr. Hartman by Allied Technologies

that there's no vanilla in either of those products derived from a vanilla bean?

A. No. You're wrong because we have other tests we did that we -- vanilla extract has certain chemical in it. None of those are in this extract. Only the vanilla. So that's all telling me what the rest I can analyze vanilla extract based on many things. But one simple way is to look for the other ingredient and coming with vanilla extract, they are not there. None of them. So that can tell me more likely there is vanilla there but I don't want to say for sure there's no drop of vanilla. I don't want to say that because there's still chance that there's very little vanilla and plus vanilla from another source.

Q. Right. Okay. So the correct statement would be based on the testing available and conducted in this case, you think it's most likely that there is no vanilla in these products derived from a vanilla bean but you can't be sure of that?

A. Correct.

Q. Okay. You mentioned too that it would be easier to test the actual flavors themselves rather than the entire product, right?

A. Correct.

Q. Okay.

A. Because it's concentrated 100 times more.

Q. Okay.

A. But I was never provided with the flavor.

Q. Did you ask not for the flavor?

A. Did I ask for the flavor?

MR. REESE: Do you want to give us the flavor?

A. Do you want to give us the flavors?

Q. My question is, did you ask?

A. I think we talked about it.

Q. With whom?

A. With Spencer.

Q. Mr. Sheehan, alright. And did you tell him that to answer the question of whether the vanilla and or the vanillin rather in A&W root beer or A&W cream soda was derived in whole or in part from vanilla beans that it would be useful to test the flavors itself?

A. I did. But I don't remember what he told me I did because it's easier instead of extracting it.

Q. Right. Now, you saw Mr. Krueger's result testing of the flavors, correct?

A. I did.

Q. Did that indicate to you that there was vanilla derived from vanilla beans in both the root beer and the cream soda products?

to hydroxybenzamide. That makes no sense to me. So it's a flavor that someone make, you know, people make flavors and they put all those four to make it look like vanilla extract too.

Q. So let me ask you this, given the numbers that are in here in table one, can you tell one way or the other whether this flavor which has been labeled as vanilla extract 2X, is or is not derived from vanilla beans?

A. I don't know if it's derived from vanilla beans. I don't know. It's vanillin. It's vanillin for this message you use.

Q. Okay. How about in table two? You will see it's HPLC analysis of cream soda ingredient; do you see that?

A. Yes. Tons of vanilla.

Q. Right.

A. Definitely. Not from vanilla.

Q. Alright. But my question is, you will see that this flavor is -- excuse me, labeled as vanilla flavor WONF or WONF; is that correct?

A. Yes.

Q. And WONF to my knowledge, that stands for with other natural flavors, yes?

A. Yes. Which is illegal term in vanillin.

Q. Illegal to do what?

A. It's illegal to have vanilla WONF and put vanilla in it. If you put vanilla in it, it's all artificial. You can't call it vanilla anymore. You have to call it artificial vanilla. That's straight standard of identity. That doesn't mean that people don't do that.

Q. The standard of identity is good, but my question here is when one says WONF for with other natural flavors that is indicating that the vanilla in the vanilla flavor is a natural flavor, correct?

A. That's a very grey area. Not everyone agree with everyone but, basically, it is saying that you have a drop in the bucket of vanilla extract and the rest is from other natural flavor.

Q. Is what you read this suggesting?

A. That, um, tons of vanilla from other sources it can be natural but from other sources, not from vanilla. There's very little vanilla in it.

Q. So you would agree that it's quite possible that there is vanilla from or derived from a vanilla bean in this flavor but with vanillin from other sources added to it?

A. Yes.

Q. And you don't know what the ratio of the real or the vanilla from vanilla beans to vanillin to other sources is, do you?

A. No. In order for me to do that, I need the flavor because this is the too diluted. It is hard to do. If I want to know really vanilla has 600 chemical in it. Those are the people associate. I look at the rest too.

Q. Okay.

A. But there would be certain amounts sometimes doesn't mean we can see them.

Q. So let's stick with --

A. One more thing. I don't see the reason.

Q. Yes, please.

A. Why when you make a flavor that is also natural and artificial, why bothering putting expensive vanilla extract in it. But that's an opinion, you know, why would you do that?

Q. Well, you tell me. Would there be a benefit to putting natural vanilla in?

A. No. No. Because the amount of is so small it's not going to effect. You could just put vanillin in it and vanilla from a natural is or vanilla from a synthetic source today's the same. There's no different.

Q. Okay. How about vanilla from a vanilla bean as opposed to vanilla WONF or synthetic vanilla?

A. Huge difference. Huge.

language includes language that you suggested?

A. Yeah, I think so but I can't tell you if I read it. Again, I tell you which one. Most of it I wrote the report. And he just put it together. I wrote the original report.

Q. Okay.

A. And then he put it together. So if want -- if he has the original one, you can ask Spencer because I, um, don't know the moment where it is. I probably can find it but somewhere in my computer.

Q. Alright. When were you asked to write a report?

A. A date you ask me?

Q. Yes.

A. When we finish all the evaluation and then.

Q. Which evaluation? The Allied evaluation?

A. Both of them, yeah. They were the last one.

MR. REESE: It's Alliance I believe, right?

Q. Alliance.

MR. REESE: Alliance.

A. And can't believe companies still call them Alliance. It is so many of them.

MR. REESE: You said Allied.

Q. I meant to say Alliance. So if we look at the Alliance report which is Exhibit 1 to your report. The date of that Alliance Technologies report is August 27,

2019; do you see that?

A. Okay.

Q. Alright. So you were asked to prepare a report after that date?

A. Yes.

Q. Okay. Do you know how Alliance Technologies was selected?

A. Um, no.

Q. Had you ever heard of Alliance Technologies before?

A. Yeah.

Q. Had you ever worked with Alliance Technologies before?

A. No.

Q. Do you know what expertise, if any, Alliance Technologies has in the food arena?

A. Yeah. Um, what they recommended, somehow they recommend them to other people in university recommend them.

Q. Did you recommend Alliance to Spencer Sheehan?

A. Not directly. After he found them, I said they are okay.

Q. Okay.

A. It is not that complicated to run that.

Q. To run the gas chromatography mass spectrometry

test?

A. Yes. They are certified of FDA. They know what they are doing. They do a lot of central load there. They have been around for a while.

Q. Is there any art to performing such a test or you just plug the material in and let the machine go?

A. Well, you have to analyze it after the machine go. You have to know if everything is -- if everything align correctly. It's not like a technician. It's a fancy technician.

Q. Okay. And when you're talking about analyzing it afterward, is that what you're doing or what they are doing?

A. What they are doing.

Q. Okay.

A. I analyze the data. I don't analyze the machine.

Q. Alright. Alright. So we'll get back to that. So this report that was the report is dated September 12, 2009; do you see that?

MR. REESE: It's eight.

He means your report.

A. Oh.

Q. We got a lot of reports here. I will try to be clear. So the date of your report is September 12, 2019, correct?

A. No. Maybe I got confused between another soda but that's just -- let go.

Q. Alright.

A. But --

Q. And that is what you said would be misleading if there was a Forest Alliance certification?

A. That would be misleading.

Q. You agree because if you have tons of vanilla they are certified by --

A. I don't see everything here but you don't have the box, am I right? You don't have the box here, no. Here is the aged vanilla. Okay. So there is vanilla here that should be -- this is also misleading.

Q. And you're pointing to the aged vanilla?

A. Yeah.

Q. And why is that misleading?

A. Aged vanilla is very, very, very elusive idea because and vanilla can be -- and vanilla would be like someone I saw recently put our vanilla beans coming from hand pollination. There is no other way. Hand pollination is unique. It is not -- that is how vanilla pollenated by hand so aged vanilla is the vanilla in the process of curing. All vanilla go to the process of curing. And aged vanilla you kept it three months because you wanted to have an inventory. What is aged

vanilla? For me I don't know what is the aged vanilla.

Q. But it could be vanilla that has gone through the process of curing?

A. All -- you can't use vanilla that was not cured. It's green bean, you can't use them. All vanilla beans that you are familiar with goes through the process of curing. There is no such thing otherwise. So that would be like overdone. Not the end of the world, but it's overdone to tell your consumer that you -- and vanilla, but most people are in -- not thinking of the curing because they don't know about the curing. Age always remind them of wine. Aged wine is more expensive. It is more smooth. Aged vanilla is but you see A&W consider to be an old fashioned, old fashioned drink. Like root beer, the real root beer is very old fashioned too. So that may be why they put it there.

MR. REESE: I have a call at two. It is about eight minutes. I want to give you a heads up.

MR. MAGID: That would be absolutely fine.

Q. And vanilla can mean different things to different people?

A. Yes. There's no define but it's also can confuse the people.

Q. And so --

A. I can't read everything in here. I can't read

A. But I already know that there's ethyl vanillin.

Q. I understand.

A. If I say maybe mean I meant maybe.

Q. Okay.

A. But the chemistry said it's ethyl vanilla there.

Q. Right. Now, the fact that there may be ethyl vanillin in it, doesn't than mean there is also vanillin from other sources, correct?

A. Absolutely.

Q. So you could have both ethyl vanillin and vanillin from vanilla beans?

A. Absolutely. I don't think there is a vanillin from vanilla beans. I don't think it's from vanilla beans.

Q. Because it's expensive?

A. It is not the product chemists use. Yes, it's expensive. It is hard to get. Why would they put it there? It is my opinion. That doesn't mean that they didn't, okay.

Q. Alright. And then you talk a little bit about cream soda here. And in the cream soda you say?

A. Where are you?

Q. Paragraph 41 now.

A. Okay.

Q. So on page five. You say that in contrast to the

root beer the peak report TIC and chromatogram for the cream soda products reveal the presence of vanillin, correct?

A. Right. That is on this graph that you have before.

Q. And, here is no way to tell whether that vanillin is from a vanilla bean or from some other source; is that right?

A. There is no way for the equipment, that equipment vanillin is -- vanillin, you know why? Because this break in the molecule doesn't tell you anything about it. It just the way you break it. It doesn't matter what's coming.

Q. You would have to do the more sophisticated analysis to answer that question?

A. And even so and even so you may not have an answer. Yes. You mean you have to isolate it all the vanilla unless you give us the flavor.

Q. Okay. And then you mentioned at paragraphs 43 and 44.

A. Hold on.

Q. That in addition to vanillin there's ethyl vanillin, correct?

A. Right, yes.

Q. But the presence of ethyl vanillin doesn't mean

that there cannot be vanilla bean extractives?

A. Correct. So if you have vanillin from vanilla. I mean, from vanilla extract and you have vanillin from Eugenol or synthetic, on the chromatic it is one thing.

Q. So you can't tell the difference?

A. No one could tell the difference. The equipment could not tell. They all come together because it is same chemical.

MR. REESE: If I could just, if you could wouldn't mind spelling that for the court reporter.

A. It is Eugenol. E-U-G-E-N-O-L.

Q. Alright. Alright. So I think you've answered most of my questions. Until we get -- so we're actually making better progress than you think. Until we get to page seven or your report.

A. Okay.

Q. Alright. And so you describe here the process of aging vanilla beans, right?

A. Yes.

Q. At paragraph 52 and then 53 and 54 and 55.

A. Yeah. This is the like what people used to think it's not like what they are doing now. They -- this is from people think that they used to put vanilla extract in barrel and while it's there it was aged and I know that none of it's not done today but I just mention it

Q. So if you turn to the chromatogram on page six for example. There is a peak for vanillin, correct?

A. Yes.

Q. And we don't know whether that peak is from vanillin derived from vanilla bean or otherwise, do we?

A. We don't. Vanillin is vanillin. You could put in the flavor. Many different vanillin. They are all going to be in this peak.

Q. Okay. So then let's go to the next exhibit which is Dana Krueger's exhibit?

A. Okay.

Q. Alright. And you will see that he refers to doing HPLC analysis; do you see that?

A. Standard. Okay.

Q. Okay. That's a standard analysis for vanillin?

A. Yes.

Q. Is there any reason to do HPLC versus gas chromatography mass spectrometry?

A. Yes.

Q. And what's that reason?

A. This is a standard. She already knows. She has vanilla. She knows what she has. She just want QC. What Jonathan did identify them she can't identify them. Vanillin really identify it. She needs the mass spec for that.

Q. And it's also actually Mr. Krueger despite the Dana name when Mr. Krueger goes this HPLC. You say that he already knows that it's vanilla?

A. Vanillin.

Q. Vanillin?

A. He thinks he knows. So if you want to get the chemistry here, you separate the chemical based on molecular weights, based on how they dissolved and then you see a peak. But this peak can be other things too. So it's not totally accurate but for the QC or everyday vanilla, that is what we use but if you want really to know what is in this peak and it's only one people and not other chemical that are very similar they have, you have to do what Jonathan does. I wouldn't go to use Jonathan for every day vanilla. It's expensive. It's unnecessary.

Q. Alright. And you also mention this expensive test that would enable someone to determine whether vanillin was derived from vanilla bean; what do you call that test?

A. That's beta analytics will do. It's isotopic ratio of C14, C12 to C13.

Q. And what is C12 and C13?

A. Okay. So you have the carbon. So most of the carbon is 12 molecular weight. But okay. Let's start a

A. But that's not the flavor in the root beer. This is just an ingredient. We don't know how much he put in the root beer.

Q. Okay.

A. But that's not fair that -- that he's telling us what the rest of the flavor. Why is he telling us only about the vanilla in the root beer? It's not only vanilla in the root beer. There is something else.

Q. Okay.

A. And guarantee, guarantee that these people didn't get vanilla alone and the rest and they got one flavor. They didn't get the vanilla by themselves and they then make the mix. They got the flavor, a finished flavor. They get a flavor they call root beer that has that vanilla in it. That is what they got and that is what they put in the root beer. Companies don't make their ow flavor and mix it. Don't believe it. That is my opinion.

Q. Okay.

A. But he took the time to tell us here is the vanilla that they put in. The flavor when he didn't tell us the rest. That's very fishy.

Q. Okay. But you would agree in terms of the results from the HPLC analysis that when he says in my opinion the results obtained for this ingredient are

typical for a pure vanilla extract of approximately 2X concentration. You have no reason to disagree with that?

A. I don't disagree. I have no reason to believe that this is part of the flavor he just took a vanilla extract and sent it to us. Big deal. I could get you a million of them. I don't know. I want the flavor. Not half of it.

Q. Alright. So --

A. That is useless for me.

Q. Okay. To be clear, you're point is this ingredient that he's testing may well very be vanilla extract?

A. It is vanilla extract probably but I don't have any proof that this is what is in the root beer or cream soda. He just give me a sample of vanilla extract 2X, big deal.

Q. But you would agree that the sample that he tested based on the results would be consistent with pure vanilla extract of approximately 2X concentration?

A. I still thinks it is too much vanilla in it but I'm going to let go of it.

Q. Okay. And then he tests a vanilla flavor ingredient that was represented to him as being an ingredient in the cream soda; do you see that? And

again those results are at table two. And Mr. Krueger says in my opinion, the results obtained for this ingredient are typical for a vanillin type of flavor based on the concentrations of the substances indicative of vanilla. This is from a vanilla extract of approximate 1X concentration that has been fortified with added vanillin. Do you have any reason to disagree with that statement?

A. No.

Q. And then he concludes, in conclusion it is my opinion, to a reasonable degree of scientific certainty, that both A&W root beer and A&W cream soda contain natural vanilla as an ingredient. Do you disagree with that?

A. He didn't say how much.

Q. Okay.

A. I think it may be vanilla there but very small amount.

Q. Okay.

A. There's no proof that there is. There is no proof that there is not.

MR. MAGID: Those are the questions I have for you. Thank you.

(Deposition was concluded at 2:46 p.m.)